80-747

Supreme Court, U. S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

ELVA JEAN ANDERSON

Respondent.

APPENDIX

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Counsel of Record
Principal Attorney, Appeals

BY: ANNE B. WETHERHOLT
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit MI 48226
(313) 224-5792

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APPENDIX "A"

STATE OF MICHIGAN
COURT OF APPEALS

People of the State of Michigan,
Plaintiff-Appellant

v

Docket # 26966

ELVA JEAN ANDERSON,
Defendant-Appellee

Before: Beasley, P.J., and V. J. Brennan and J. R. McDonald, JJ.
PER CURIAM

Defendant Elva Jean Anderson was charged with the offense of first-degree murder, contrary to MCLA 750.316; MSA 28.548. The trial commenced on October 6, 1975, before Recorder's Court Judge Thomas L. Poindexter. On October 9, 1975, the trial court accepted defendant's plea of guilty to the offense of manslaughter, contrary to MCLA 750.321; MSA 28.553, over the objections of the prosecuting Attorney. On November 24, 1975, defendant was sentenced to probation for a period of three years. Prosecution filed claim of appeal on January 27, 1976.

This case is straight forward. Defendant was charged with the offense of first-degree murder. Trial commenced on that charge October 6, 1975. On October 9, 1975, defendant pled to the included offense of manslaughter, contrary to MCLA 750.321; MSA 28.553. Prosecution objected to acceptance of the plea by the trial court. Prosecution still had two res gestae witnesses to present. The trial court overruled the prosecution's objections to acceptance of a plea to the offense of manslaughter. The trial court stated that

"after hearing the testimony up to this time, the charge of murder should not have been made in this case; the judge who conducted the examination in this case, if she had heard the testimony that has been given in this court, would not have bound the defendant over on the charge of murder in the first degree * * *".

The trial court sentenced defendant to spend three years probation on the manslaughter conviction. On appeal, prosecution raises two principle allegations of error. We will speak to each one as presented.

Prosecution first contends that the trial court erred by accepting defendant's plea to the offense of manslaughter over objection.

We do not believe extended analysis is required in order to resolve this issue. Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 250 NW2d 145 (1974). See People v Morgan, 63 Mich App 686, 688; 235 NW2d 154 (1975). In Genesee Prosecutor, the Michigan Supreme Court held that error was committed when a trial court accepted a plea of guilty to a lesser included offense to the offense charged where the plea was taken over the prosecution's objections. Defendant there was charged with murder. The trial judge accepted defendant's plea to the offense of manslaughter over the prosecution's objection. The Supreme Court held that the trial court committed reversible error in so accepting the plea. Genesee Prosecutor v Genesee Circuit Judge, supra at 121-123. See also Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 684; 194 NW2d 693 (1972).

We find this case controlled by the Genesee Prosecutor decisions. Read together, those two cases prohibit a trial court from accepting a plea to a lesser included offense over prosecution's objection. The trial court in the instant case accepted defendant's plea to the offense of manslaughter over the prosecutor's objection.

At the time the judge accepted the plea, the two remaining prosecution witnesses might very well have, through their testimony, proved the elements beyond a reasonable doubt that the trial judge thought were lacking. We feel he should have heard those witnesses.

We must next decide whether prosecution is barred from retrying defendant on the charged offense of first-degree murder because the trial court accepted defendant's plea of guilty to the offense of manslaughter after the trial had begun.

The Michigan Supreme Court has held that where a plea of guilty to the lesser offense is accepted but reversed because of non-compliance with the guilty plea rule prosecution cannot reprosecute defendant on the higher, originally charged offense. People v McMiller, 389 Mich 425, 434; 208 NW2d 451 (1973). However, in Genesee Prosecutor, the Supreme Court held that McMiller does not bar reprosecution on the original charged offense where prosecution seeks appellate relief from the incorrect acceptance of the guilty plea over the prosecutor's objections. Genesee Prosecutor v Genesee Circuit Judge, supra at 123.

We believe Genesee Prosecutor applies in this case and that no double jeopardy arises even where defendant's plea was accepted after trial had commenced. As the Supreme Court observed in McMiller, defendant in this case "was never in peril of being convicted and punished for murder [the higher charge]. He has not 'run the gauntlet' on that charge." People v McMiller, supra at 431. We thus find retrial on the original charge reasonable and proper. Genesee Prosecutor v Genesee Circuit Judge, supra at 122-123.

Reversed and remanded for trial on the charged offense of first-degree murder.

APPENDIX "B"

State of Michigan
Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

v No. 60502

ELVA JEAN ANDERSON,
Defendant-Appellant

Before the Entire Bench

Levin, J.

After the prosecution had examined some, but not all, of its witnesses in a murder case, the trial judge, over vigorous prosecutorial objection, accepted Anderson's plea of guilty to the charge of manslaughter, dismissed the murder charge and discharged the jury. The prosecution seeks, by this appeal, the opportunity to retry Anderson on a charge of first-degree murder. The issue is whether retrial is barred by the Double Jeopardy Clause.[1]

We hold:

The trial judge's action represented a resolution of "some or all of the factual elements" of the murder charge and was therefore an acquittal for double jeopardy purposes, barring reprosecution. It is irrelevant that the acquittal
a) was not so denominated by the trial judge, b) may have been erroneous both procedurally and in terms of the questions of law on which it was founded, and
c) came about with defendant's cooperation and consent.

I

Elva Jean Anderson was charged with first-degree murder. Willie Young testified that he saw her shoot and kill Willie Ray Russell.[2]

Young, a doorman at a hotel, testified that Barbara Golden and Russell came to the hotel and went to the front desk. Golden kept looking "funny" at Young. She talked with the desk clerk and with Young. After Young said, "You turn around and go on back out the door. I don't want no trouble in here," Russell left the hotel. Golden made a telephone call, and then waited with Young in the hallway of the hotel.

About 20 minutes later, a taxicab pulled up and two passengers stepped out; Anderson was one of them. Golden ran up to Anderson, who slapped her. Anderson, Golden and the other person who had arrived in the cab walked around the side of the hotel. About two to three minutes later, Young saw Anderson pull a shotgun out of her "britches" and open the door to the car in which Russell was now sitting. A brief conversation ensued, Young heard Golden say "don't shoot him," and then he heard a shot. After the shot, Young heard Anderson say "[m]other fucker, I bet you won't try to rape nobody else."

Anderson was bound over on a charge of first-degree murder. A pretrial motion to quash was denied.

At trial, the prosecution had presented its first five witnesses, but had not yet completed presenting its case, when the judge entertained a motion for reduction of bond. Over the prosecutor's objection the judge granted Anderson's release on personal bond, stating that "the proofs [of murder] in this case are not strong."

Thereupon, an off-the-record side bar conversation was held with counsel. Immediately thereafter, following an apparently brief conversation

between Anderson and her counsel, she offered to plead guilty to a charge of manslaughter.

Over the prosecutor's objection, the judge proceeded to take Anderson's guilty plea, advising her of her rights and establishing a factual basis for her plea. She said that Golden was her lover and had called her saying that a man was waiting outside the hotel with a gun and was trying to rape her and asked Anderson to come pick her up. Anderson said that she brought her shotgun because she believed Golden when she said that a man with a gun was waiting outside the hotel and was trying to rape her. Anderson said that she approached the car in which Russell was sitting because she believed that he had attempted and still intended to rape Golden. She asked Russell to get out of the car, "because I didn't want to shoot him," and repeated the request several times. Anderson thought that Russell "was digging for a gun or something" and when he didn't come out she shot him.

The judge accepted Anderson's plea to the charge of manslaughter, said he was dismissing the "charges of murder in the first degree and murder in the second degree" and discharged the jury.[3]

The Court of Appeals reversed and remanded for trial on first-degree murder. It held that the judge was not authorized to accept a plea to a lesser offense and dismiss the murder charge over the prosecutor's objection, and declared that "no double jeopardy question arises."

II

The people contend, relying on Genesee Prosecutor I and Genesee Prosecutor II,[5] that the Court of Appeals correctly found that the judge erred in dismissing the murder charge. Anderson claims that the Double Jeopardy Clause bars further prosecution for murder whether the judge erred or not. We agree that

reprosecution is constitutionally impermissible.

In Genesee Prosecutor I this Court held that a judge is not authorized, over the prosecutor's objection, to accept a plea of guilty of an offense not charged or included in the information or indictment. Genesee Prosecutor II enlarged this holding and declared that a judge cannot, over the prosecutor's objection, accept a plea of guilty of a lesser included offense and dismiss the charge of the greater offense; we set aside a plea of guilty of manslaughter and remanded for trial on the charged offense of murder. In those cases, however, the plea was offered and the charge dismissed before trial and impaneling of a jury. We noted that there was no double jeopardy issue in Genesee Prosecutor II because the defendant "has not been tried for murder."[6]

The judge's actions in accepting a plea of guilty of the lesser offense of manslaughter and dismissing the murder charge appear to have been violative of Genesee Prosecutor II. It is, however, a separate question, one controlled by the decisions of the United States Supreme Court, whether the Double Jeopardy Clause would be violated by a retrial of Anderson for murder after jeopardy had attached in respect to that charge. We conclude (part III, infra) that the Double Jeopardy Clause would be violated by retrial because the judge made a factual determination upon the prosecutor's proofs that one or more elements of murder could not be established. This is true notwithstanding that the judge's acceptance of a plea to a lesser offense over the prosecutor's objection appears to have violated the specific dictates of Genesee Prosecutor II.

A

The constitutional protections of the Double Jeopardy Clause are implicated only when jeopardy has "attached." Jeopardy attaches in a jury trial when the jury has been impaneled and sworn.[7]

The Clause secures the defendant's interests in (1) the finality of judgments,[8] and (2) protection against multiple prosecutions.[9]

If a trial ends in a judgment of acquittal, both interests are implicated, and there can be no retrial.[10] This has been called " the most fundamental rule in the history of double jeopardy jurisprudence,"[11] and is absolute. It applies whether the acquittal is based on findings of a judge or the verdict of a jury,[12] and whether it is erroneously based[13] or brought about with the defendant's voluntary participation.[14]

Where, however, the trial or proceeding does not end in a judgment of acquittal or conviction, only the second interest is implicated, and the constitutional protections are not absolute. The defendant has an interest in avoiding harassment from repeated proceedings[15] and in having his guilt decided by the jury impaneled to try him.[16] The people, however, have a competing interest in having one complete opportunity to try those accused of breaking the law.[17] Where there is no judgment of conviction or acquittal, these interests are balanced.[18]

If the trial or proceeding ends without the defendant's consent, further prosecution is generally barred; the defendant's "valued right to have his trial completed by a particular tribunal"[19] was taken from him, and reprosecution smacks of harassment. An exception is recognized, and retrial permitted, where "manifest necessity" compelled the termination of the first trial or proceeding.[20]

Where the defendant himself brings about the termination of the proceeding on a basis unrelated to factual guilt or innocence, retrial is generally permitted.[21] The defendant, having deliberately chosen to take the case from the jury cannot complain of the loss of the first trier of fact or of prosecutorial

harassment through multiple prosecutions; he must live with "the consequences of his voluntary choice."[22] An exception is made, and retrial barred, when the defendant's motion is induced by bad faith conduct of the prosecutor or judge.[23]

B

The prosecution contends that it is apparent from statements by the judge following acceptance of the guilty plea and dismissal of the murder charge that he merely found an abuse of discretion in the pretrial charging process. From this it argues that the trial did not end in an acquittal on the murder charges --there was no "final judgment" that Anderson has an interest in preserving; because the trial was terminated on a basis unrelated to factual guilt or innocence, with Anderson's cooperation and over prosecutorial objection, her interests are subordinate to those of the people; she cannot complain of harassment by multiple prosecution; the people seek only "one fair opportunity" to convict, which was wrongfully taken from it by the judge.

We reject the premise of the people's argument. We conclude that the judge's action was an acquittal of the murder charges for double jeopardy purposes. No balancing of interests is required; reprosecution is barred.

III

To be sure, the judge did not say that he was directing a verdict, and no formal judgment of acquittal was entered. The determination of what the judge did, however, does not turn on how the judge characterizes his actions. "[T] he trial judge's characterization of his own actions cannot control the classification of the action,"[24] What constitutes an "acquittal" is not controlled by the form of the judge's action.[25]

To decide how a trial judge's action should be characterized, the reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[26] There is an acquittal and retrial is impermissible when the judge "evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction."[27]

We conclude that the judge's decision to accept Anderson's mid-trial plea and to dismiss the murder charge involved a resolution of factual elements of the offense charged, and was based on his belief, correct or incorrect, prematurely formed or not, that the evidence was insufficient to support a conviction of murder.

A

In accepting Anderson's plea to manslaughter, the judge considered her factual guilt or innocence of that lesser offense. The judge examined Anderson to determine whether there was a factual basis for her plea. The judge found that she had committed manslaughter.

The transcript convinces us that the judge chose to accept this plea to manslaughter because he concluded that Anderson had not committed murder.

The prosecution emphasis the judge's statements that he was merely granting Anderson's pretrial motion to quash the information charging murder. But those statements were made only as an afterthought in response to the prosecutor's arguments and objections.

The judge expressed his belief that there is an exception to the Genesee Prosecutor cases when the prosecutor has abused his charging discretion and said that the exception "does not apply" "to this case except to the following extent":

"The Court would find in this case after hearing the testimony up to this time, that the charge of murder should not have been made in this case; that the judge who conducted the examination in this case, if she had heard the testimony that has been given in this court, would not have bound the defendant over on the charge of murder in the first degree and that this Court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the Court had been in possession of the facts which this Court has heard in this case." (Emphasis supplied)

The judge proceeded to explain his understanding of the law of homicide, particularly the defenses of excuse and justification.[28] On the basis of this understanding, he expressed his belief that the prosecution had not and could not overcome Anderson's assertion of a justification defense.

"The people, nevertheless, in a case have the burden of proving that it was not a case of justification, or excuse - this has been held in a number of recent cases and the People must also prove a number of other exceptions to the law - that it was not an accident, for instance, and, in this particular case, we are dealing with the situation of a private citizen who took the law into her hands and killed another person - as she says - enforcing the law.

* * *

"In determining whether the defendant was justified under these circumstances the matter must be determined from lthe standpoint of the defendant in the case, not from te standpoint of

the officers - the officer in charge of the case, nor from the standpoint of the prosecutor, or the judge, but from her own honest intentions in a matter of this kind, and the Court feels that there was - under these definitions, if the defendant had only used reasonable force in the case, she would have been justified under the circumstances of this case.

"The reason that this Court has accepted the plea of manslaughter in the case is the fact that the Court concludes that she did not limit herself to reasonable force in his case but that she went beyond reasonable force in the case, and, therefore, committed the offense of manslaughter in this case, which is the crime as, for instance, where a policement, in making an arrest, uses excessive force and commits a homicide - the crime is manslaughter and the same rule would apply to a citizen as in this case and, accordingly, this court dismisses the - court grants Mr. Roth's motion filed prior to the trial of this case to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree, leaving the charge of manslaughter to which the defendant has just pled guilty in this case." (Emphasis supplied)

After the prosecutor objected that there was sufficient evidence to sustain a conviction and that he had two more res gestae witnesses that the court had not allowed to testify, the judge responded:

"[T]he Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and secondgree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

* * *

"You are overlooking the fact that the law -it is clearly established that in determining matters of this kind, it must be looked at from the belief and position of the defendant, not the beliefs or position of the officers in the case or any other person, and that the Court, having heard witnesses called by the People in the case, was convinced that she was well justified in believing that there was an attempted rape in the case." (Emphasis supplied)

Another prosecutor then appeared to add his protest to that previously made. He also inquired whether "by proffering this plea, and by the Court accepting it, that the defense would waive any question of jeopardy that may arise in the substantive case?" Defense counsel responded negatively. The judge then said "that is a question that would properly have to be determined by the United States Supreme Court." He indicated that his decision was not based on an examination of the preliminary examination transcript, saying that he had felt that "based on the testimony taken at the examination, that the prosecution was justified in taking the matter to trial without any reduced plea." He then added somewhat gratuitously that "if the examining magistrate had heard the testimony that has been heard in this court that the defendant would not have been bound over for trial on the charge of first-degree murder in this case."

The judge did not determine that there was a defective information or dismiss the murder charges on a gound unrelated to Anderson's guilt or innocence;[29] he did not find an abuse of discretion by the examining magistrate or prosecutor. He determined, rather, that Anderson could assert a defense of excuse, that its merits must be assessed from the standpoint of her reasonable belief, and that, based on what he had heard

at trial, the prosecution had not proved and could not prove beyond a reasonable doubt that she did not believe the killing was necessary to prevent the commission of a felony. The witnesses up to that point had not given testimony disproving excuse "from the belief and position of the defendant" and the judge was convinced that testimony of the remaining witnesses would, for the same reason, be insufficient.

That ruling was a determination of Anderson's factual innocence of murder, although rested on questions of law.

The United States Supreme Court has held that an appellate ruling that there was insufficient evidence to rebut an insanity defense was "a resolution, correct or not, of some or all of the factual elements of the offense charged," and thus an acquittal barring reprosecution.[30] Subsequently, commenting on that holding, the Court elaborated:

> "The defense of insanity, like the defense of entrapment, arises from 'the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense' * * * where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts. Such a factual finding does 'necessarily establish the defendant's lack of criminal culpability' * * * . By contrast, the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." (Emphasis in original)[3]

A defense of excuse or justification, like defenses of insanity or entrapment, "necessarily establishes lack of culpability" within the meaning of the passage just quoted, because it goes to the central issue of criminal

intent.[32] It is irrelevant that the resolution of the factual issue depended on rulings of law concerning the defense of excuse and justification.[33]

B

Once it is determined that the judge resolved factual questions dispositive of elements of murder in Anderson's favor, it follows that retrial for murder is barred.

Fong Foo v United States[34] highlights that the rule prohibiting retrial after acquittal is absolute. After three government witnesses had testified, and while a fourth was in the process of testifying, the trial judge directed verdicts of acquittal and entered formal judgments accordingly. He advanced two reasons for doing so: there was improper conduct on the part of the prosecutor and the witnesses lacked credibility. The Court of Appeals set aside the acquittals and ordered retrial. The Supreme Court reversed in a brief opinion, holding that because the trial terminated in final judgments of acquittal, government appeal was barred even though "[t]he Court of Appeals thought, not without reason, that the acquittal was based upon egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed * * * without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution.' United States v Ball, 163 US 662, 671 [16 S Ct 1192; 41 LEd 300 (1896)]."[35]

In Sanabria v United States, 437 US 54; 98 S Ct 2170; 57 LEd 2d 43 (1978), where the judge excluded certain evidence and acquitted the defendant for evidentiary insufficiency, the Court, on the basis of Fong Foo, held that retrial was impermissible and observed that "when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous."[36]

In the instant case, the judge should have allowed the prosecution to present all of its witnesses. He could then have entertained a motion for a directed verdict. Fong Foo demonstrates, however, that a procedural error, even of this magnitude, does not change the finality of an acquittal, any more than would an erroneous determination of the elements of the crime charged.

Citing United States v Scott, 437 US 82, 98 SCt 2187; 57 LEd 2d 65 (1978);[37] Lee v United States,[38] and United States v Dinitz, the people argue that retrial is permitted after a defendant causes or participates in termination of trial on a basis unrelated to factual guilt or innocence. That argument, however, falls with its premises that the first trial was brought to a close "on a basis unrelated to factual guilt or innocence."

The trial in Dinitz ended in a mistrial after the judge expelled one of the defendant's lawyers. In Scott, the indictment was dismissed because of preindictment delay. In Lee, the information failed to list all the elements of the offense charged. In none of those cases was the termination of proceedings related to factual guilt or innocence. Since the dismissal here was related to Anderson's factual guilt or innocence, it is irrelevant that she consented to, or even requested, the judge's action terminating the trial.[39]

Although a judge should not rule on the sufficiency of the evidence until the prosecutor has had an opportunity to present his entire case and while the principle underlying the Genesee Prosecutor cases is of considerable importance, these precepts must yield to the rights secured by the Double Jeopardy Clause.

We reserve the judgment of the Court of Appeals.

/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ G. Mennen Williams
/s/ John W. Fitzgerald
/s/ James L. Ryan
/s/ Mary S. Coleman
/s/ Blair Moody, Jr.

[1] US Const, Am V; Const 1963, art 1, § 15.

[2] The facts are taken from the transcript of the preliminary examination. The strenographic notes of the three day trial have not been transcribed except for the colloquy concerning Anderson's plea of guilty of manslaughter.

[3] Anderson was sentenced to three years' probation on the manslaughter charge.

[4] Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672; 194 NW2d 693 (1972).

[5] Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974).

[6] Id., p 123.

[7] Crist v Bretz, 437 US 28; 98 S Ct 2156; 57 LEd 2d 24 (1978).

[8] Id, p 33; Brown v Ohio, 432 US 161; 97 S Ct 2221; 53 LEd 2d 187 (1977); United States v Jorn, 400 US 470, 479; 91 S Ct 547; 27 LEd 2d 543 (1971) (plurality opinion).

[9] United States v Scott, 437 US 82, 92; 98 S Ct 2187; 57 LEd 2d 65 (1978); Arizona v Washington, 434 US 497, 503-505; 98 S Ct 824; 54 LEd 2d 717 (1978); Green v United States, 355 US 184; 78 S Ct 221; 2 LEd 2d 199; 61 ALR 2d 1119 (1957).

[10] Sanabria v United States, 437 US 54, 64; 98 S Ct 2170; 57 LEd 2d 43 (1978); United States v Scott, supra, pp 91, 96; United States v Martin Linen Supply Co., 430 US 564, 571; 97 S Ct 1349; 51 LEd 2d 642 (1977); Fong Foo v United States, 369 US 141, 143; 82 S Ct 671; 7 LEd 2d 629 (1962).

Although retrial following an acquittal is barred, the government may appeal, is sought, e.g., where the judge

enters an acquittal on a post-trial motion. United States v Wilson, 420 US 332; 95 S Ct 1013; 43 LEd 2d 232 (1975).

11 United States v Martin Linen Supply Co., supra, p 571.

12 Sanabria v United States, supra, p 64, fn 18; United States v Scott, supra, p 91; United States v Martin Linen Supply Co., Fong Foo v United States, supra.

13 Sanabria v United States, supra, p. 64; United States v Scott, supra, p 98; Fong Foo v United States, supra.

14 Sanabria v United States, supra; cf. United States v Scott, supra, pp 98-101.

15 " '[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " United States v Scott, supra, p 87, quoting Green v United States, supra.

"There are a number of reasons a retrial enhances the risk that 'even though innocent, [the criminal defendant] may be found guilty.' * * * A retrial affords the Government the opportunity to re-examine the weaknesses of its first presentation in order to strengthen the second. And, as would any litigant, the Government has been known to take advantage of this opportunity. It is not uncommon to find that prosecution witnesses change their testimony, not always subtly, at second trials. See Arizona v Washington, 434 US 497, 504, fn 14 [98 S Ct 824; 54 LEd 2d 717] (1978), quoting Carsey v United States, 129 US App DC 205, 208-209; 392 F2d 810, 813-814 (1967)." United States v Scott, supra, p 105, fn 4 (Brennan, J., dissenting).

16 Downum v United States, 372 US 734, 736; 83 S Ct 1033; 10 LEd 2d 100 (1963).

17 United States v Scott, supra, p 100; Arizona v Washington, supra, p 509.

18 United States v Scott, supra, p 92; see, also, United States v Jorn, supra, pp 480-482 (plurality opinion); Wade v Hunter, 336 US 684, 689; 69 S Ct 834; 93 LEd 974 (1949).

19 Wade v Hunter, supra, p 689.

20 "Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." Arizona v Washington, supra, p 505. See, also, e.g., United States v Scott, supra, pp 92-93.

21 United States v Scott, supra, p 100. See United States v Dinitz, 424 US 600, 607-608; 96 S Ct 1075; 47 LEd 2d 267 (1976); United States v Jorn, supra, pp 484-485 (plurality opinion).

22 United States v Scott, supra, p 99.

23 Lee v United States, 432 US 23, 33-34; 97 S Ct 2141; 53 LEd 2d 80 (1977); United States v Jorn, supra, p 485 (plurality opinion).

24 United States v Scott, supra, p 96, quoting United States v Jorn, supra, p 478, fn 7 (plurality opinion). See United States v Martin Linen Supply Co, supra.

In the following cases the trial judge's characterization was held not to be controlling in determining whether there had been an acquittal: United States v Appawoo, 553 F2d 1242 (CA 10, 1977) (trial judge's "acquittal" held

not an acquittal for double jeopardy purposes); United States v Hill, 473 F2d 759 (CA 9, 1973) (dismissal of indictment held to be an acquittal for double jeopardy purposes). See, also, United States v Sisson, 399 US 267; 90 S Ct 2117; 26 LEd 2d 608 (1970) (post-trial order in arrest of judgment held to be an acquittal, based on now repudiated definition of double jeopardy "acquittal").

[25] United States v Martin Linen Supply Co, supra, p 571.

[26] Id.

[27] Id., p 572. See People v Hampton, 407 Mich 354, 385-386; 285 NW2d 284 (1979) (Ryan, J.).

[28] The judge expressed his belief that it was justifiable homicide for a person to kill another so as to prevent "atrocious felonies, accompanied with violence and personal danger to others * * * the person making the attempt may, by the common law, if he cannot be otherwise prevented, be killed on the spot and the law will not recognize the act as a crime. In cases of this sort, in order to justify the homicide, it must appear that there were good grounds for a suspicion that the person killed had a felonious intent."

[29] See United States v Scott, supra, p 98 (allowing retrial where the dismissal was for pre-indictment delay).

[30] Burks v United States, 437 US 1, 10; 98 S Ct 2141; 57 LEd 2d 1 (1978).

[31] United States v Scott, supra, pp 97-98.

[32] See, also, Comment, 1978 Double Jeopardy Cases — Mistrials, Dismissals, and Acquittals, 83 Dickinson L Rev 291, 311-312 (1979):

"An example of a legal-factual defense, not mentioned in Scott, that should be unappealable is lack of specific

intent to commit the crime because of the defendant's belief at the time of the act that the underlying statute was unconstitutional. This defense must be distinguished from the strictly legal defense that the statute is unconstitutional. A favorable ruling on the former is a ruling one one of the factual elements of any crime — intent. A favorable ruling on the latter, on the other hand, does not go to culpability or insufficiency of the evidence but, rather, indicates that the defendant, though criminally culpable, cannot be convicted."

[33] It makes no difference that those rulings may have been erroneous: "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' * * * affects the accuracy of that determination, but it does not alter its essential character." United States v Scott, supra, p 98.

[34] Fong Foo v United States, supra.

[35] Id., p 143.

[36] Sanabria v United States, supra, p 64.

[37] Lee v United States, 432 US 23; 97 S Ct 2141; 53 LEd 2d 80 (1977).

[38] United States v Dinitz, 424 US 600; 96 S Ct 1075; 47 LEd 2d 267 (1976).

[39] See fn 14, supra, and accompanying test.

OPINION AND ORDER DENYING
MOTION TO QUASH INFORMATION

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs
Elva Jean Anderson)
(Docket No. 75-03831)

Opinion & Order Denying Motion to Quash Information

At a session of said Court, held in 803 Frank Murphy Hall of Justice, at Detroit, Wayne County, Michigan, on Monday, August 11th, 1975.

PRESENT: Hon. Thomas L. Poindexter
Recorder's Court Judge

In this case the Defendant, through her attorney, Benjamin Roth, 2600 Cadillac Tower, Detroit, Michigan 48226, has filed a motion alleging that there was insufficient evidence at the preliminary examination held in this cause to justify binding over the defendant on a charge of murder in the first degree, specifically citing the case of People v Hoffmeister, 394 Michigan 144, and also People v Palmer, not yet published.

This Court feels, from the manner of the killing in this case, there is sufficient evidence to go to a jury on the question of whether or not there was premeditation in the case.

The other matters that have been discussed in open Court involve, I believe, a matter of first impression to come before a Court of this system or any other system. We know, for instance, that if a husband or wife is assaulted it may constitute provocation which would reduce the charge to manslaughter in the case. Provocation, if it is

sufficient, has the effect of taking away the element of malice in a homicide case.

As this Court understands the facts in this case it is alleged that the defendant and another woman were living together in a family-type relationship and that an assault was committed upon the other woman by the deceased in this case. Shortly thereafter the defendant shot and killed the deceased. Under the circumstances of the case it is possible that, if the parties had been husband and wife, there would have been a question of provocation to present to a jury.

This is a new situation as far as this Court and, possibly, any other court in that the Courts have never recognized the rights of partners in a lesbian relationship to respond in such fashion resulting in the killing of another party for assaulting the other member of the relationship. It may be that under today's morals that this may be an acceptable relationship and that it would justify such action on the part of the defendant but this Court does not, as yet, recognize the situation as justification or provocation for an assault resulting in the killing of the deceased in this case.

Accordingly, the Motion to Quash the Information is DENIED.

(s) Hon. Thomas L. Poindexter
Recorder's Court Judge

TRANSCRIPT OF MOTION FOR BOND REDUCTION

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs
Elva Jean Anderson)
(Docket No. 75-03831)

(Jury trial in progress from proceedings of Wednesday, October 8, 1975)

PROCEEDINGS HAD AND TESTIMONY TAKEN in the foregoing entitled cause, before the Honorable Thomas L. Poindexter, one of the Judges of the Recorder's Court of the City of Detroit, and a jury, commencing on Tuesday, October 7th, 1975, and various days and dates as indicated, and this record commencing with proceedings of Thursday, October 9th, 1975.

APPEARANCES: John C. Mouradian, Assistant Prosecuting Attorney, on behalf of the People;

Benjamin Roth, Attorney at Law, on behalf of Defendant Elva Jean Anderson.

Detroit, Michigan, at or about 9:30 a.m., Thursday, October 9th, 1975. Hearing of the foregoing matter resumed pursuant to adjournment from Wednesday, October 8th, 1975.

THE COURT: Let the record show that the Court, in this case, People versus Elva Jean Anderson, No. 75-03831, is in progress from yesterday.

The Court has a motion before it at this time filed by counsel for the Defendant, Elva Jean Anderson, for reduction in the bond set in this case.

MR. ROTH: Yes, your Honor.

THE COURT: Mr. Mouradian, will you remain in the court room?

MR. MOURADIAN: Yes, your Honor. I wish to speak to the motion also.

THE COURT: You may proceed, Mr. Roth?

MR. ROTH: Yes, your Honor, at this time I would request that the defendant be released on personal bond. She has been a resident of the State of Michigan all her life and is employed, or she was before being incarcerated in this case, by the Chrysler Corporation as an Inspector. She was laid off and recalled in the month of May while she was incarcerated.

THE COURT: Mr. Mouradian?

(3)

MR. MOURADIAN: May I ask what the bond is in this case?

THE COURT: She is remanded.

MR. MOURADIAN: Well, the People would, first of all, feel that remand is proper in a first degree murder case. I think it is already on the record that she went there, in fact, with the intention of killing the man and she did.

THE COURT: That may be so, Mr. Mouradian, but the Court feels that it was misled at the beginning of the case.

There was a written motion to dismiss on behalf of the defendant. The Court, at that time, read the transcript of the preliminary examination held in the case and felt, at that time, that there was, shall we

say, considerable evidence of first degree murder -- the Court was of the opinion in that regard.

The statute permits bail in all cases except murder where the proofs are strong, and the Court feels that the proofs in this case are not strong; accordingly, the Court will release the defendant on personal bond in this case. The Court feels that if it had had all the information it has now at the beginning of this case, the defendant would never have been remanded.

(4)

MR. MOURADIAN: May we approach the bench, your Honor?

THE COURT: Will both counsel come forward. (Off record conversation.)

Ms. Anderson, will you come forward? (Defendant before the Court.)

The Court has entered an order that you may be released on personal bond in this case - the bond will be $1,000.00 personal bond.

MR. ROTH: May I have a moment, your Honor, to talk with Ms. Anderson? (Off record conversation between defendant and counsel.)

MR. ROTH: Your Honor, at this time we would wish to offer a plea of guilty in this case to the charge of manslaughter.

THE COURT: Very well, will you fill out the plea forms?

MR. ROTH: Certainly.

(Whereupon an off the record conversation was had.)

(Thereafter, the Court proceeded to take a plea

of guilty to the charge of manslaughter, which is transcribed and previously filed.)

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PLEA OF GUILTY TRANSCRIPT

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs
Elva Jean Anderson)
(Docket No. 75-03831)

Plea of Guilty

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled Cause, before the Honorable Thomas L. Poindexter, one of the Judges of the Recorder's Court of the City of Detroit, on Thursday, October 9th, 1975.

APPEARANCES: John C. Mouradian, Assistant Prosecuting Attorney, on behalf of the People;

Benjamin Roth, Attorney at Law, on behalf of Defendant Elva Jean Anderson.

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(2)

Detroit, Michigan. Thursday, October 9th, 1975.

THE COURT: This is Case No. 75-03831, People versus Elva Jean Anderson.

MR. ROTH: Defendant, your Honor.

THE COURT: Defendant, you have been charged in this case with murder in the first degree, which is a felony carrying mandatory life imprisonment.

Included in that charge are two included offenses: murder in the second degree, which is also a felony and carries any punishment up to life imprisonment or imprisonment for any term of years to be fixed by the Court.

There is a second included offense of manslaughter, which is also a felony but carries a maximum punishment of imprisonment for fifteen years.

Do you understand the possible charges against you and the possible punishments?

DEFENDANT ANDERSON: I do.

THE COURT: Mr. Roth, are you retained counsel?

(3)

MR. ROTH: No, I am assigned counsel, your Honor.

THE COURT: The Court appointed Mr. Roth as your attorney in the case; are you satisfied with his representation and are you acting on his advice in this matter?

DEFENDANT ANDERSON: Yes, I am.

THE COURT: I have here a guilty plea form; is that your signature?

DEFENDANT ANDERSON: Yes, it is.

THE COURT: And in this form you offer a plea of guilty to the charge of manslaughter, the fifteen year maximum felony; is what (sic) your wish at this time?

DEFENDANT ANDERSON: Yes, it is.

THE COURT: And I'll ask at this time what is the attitude of the Prosecution towards the plea?

MR. MOURADIAN: The Prosecution opposes the plea and has not made any plea offer in this case and we object to the plea on this record.

THE COURT: Very well, the Court will find at this time that the Court will proceed with the

(4)

taking of the plea and state the reasons why the Court thinks it is proper to take the plea at this time.

THE COURT: This plea form states that you are not on probation or parole in any case at this time; is that correct?

DEFENDANT ANDERSON: Right.

THE COURT: Have any promises been made to you by any person in order to get you to plead guilty to the charge of manslaughter in this case?

DEFENDANT ANDERSON: No, it hasn't.

THE COURT: You understand that this Court recognizes no promises whatsoever in this case, and would feel free to make any sentence up to the maximum that is permitted in this case?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: You also understand that if you wanted you could complete the trial which has been going on in this case -- a jury has been impanelled, witnesses sworn and testimony taken -- you could continue with the jury trial or it is possible that, if you so moved, the Court might decide to waive the jury and try the case without a jury; do you understand that?

DEFENDANT ANDERSON: Yes, I do.

(5)

THE COURT: You understand that you have the

right to be presumed innocent until proven guilty beyond a reasonable doubt?

DEFENDANT ANDERSON: Yes.

THE COURT: You have the right to hear and question the witnesses against you in open court?

DEFENDANT ANDERSON: Yes.

THE COURT: You have the right to have the Court's assistance to compel witnesses to come to court and testify in your behalf and to have compulsory process for that purpose?

DEFENDANT ANDERSON: Right.

THE COURT: And you have the right to remain silent or to testify at the trial, which ever you choose, and if you remain silent no inferences adverse to you may be drawn either by the Judge or jury in the case.
Do you understand those rights --

DEFENDANT ANDERSON: Yes, I do.

THE COURT: -- that you have as a defendant in this case?

DEFENDANT ANDERSON: Yes, I do.

(6)

THE COURT: And I assume that Mr. Roth, as a careful attorney, has explained all those rights to you?

DEFENDANT ANDERSON: Yes.

THE COURT: You understand, however, that by offering a guilty plea in this case you -- to the charge of manslaughter -- with regard to that charge you are

giving up your right to trial either by jury or by the Court?

DEFENDANT ANDERSON: Yes.

THE COURT: You are giving up your presumption of innocence.

You are giving up your right to confront and cross examine the witnesses in open court.

You are giving up your right to hear -- to have the Court's assistance to compel witnesses to come to court and testify and compulsory process for that purpose.

You are giving up the right to remain silent or to testify at the trial, which ever you choose, and if you remain silent no inferences adverse to you may be drawn either by the Judge or jury in the case.

(7)

Do you understand those rights that you are giving up by offering a guilty plea in this case?

DEFENDANT ANDERSON: Yes.

THE COURT: Now, has anybody -- have any promises at all been made to you by anybody to get you to plead guilty?

DEFENDANT ANDERSON: No.

THE COURT: Has anybody threatened you to make you plead guilty?

DEFENDANT ANDERSON: No.

THE COURT: You are pleading guilty, then, because you are guilty?

DEFENDANT ANDERSON: Right.

THE COURT: And you have talked this over with Mr. Roth and believe it is in your own best interests to offer this guilty plea at this time; is that true?

DEFENDANT ANDERSON: Right -- that's right.

THE COURT: Defendant, the charge in this case is that on May 22nd, 1975, on the east side of 2127 West Grand Boulevard, in the City of Detroit, you,

(8)

Elva Jean Anderson, did feloniously, deliberately, wilfully, with malice aforethought and with premeditation, did kill and murder one Willie Ray Russell, contrary to Section 750.316 of the Compiled Laws, and by your plea you are not -- you are not admitting guilt under the statement as charged, but the information includes, among others, the offense of manslaughter which, under Section 750.321 of the Compiled Laws, is a felony and carries a maximum punishment of fifteen years imprisonment.

Do you understand what you are pleading guilty to? The charge of --

DEFENDANT ANDERSON: Yes.

THE COURT: The charge of manslaughter?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: You understand that the difference between murder in the first degree and, shall we say, either murder in the first degree or murder in the second degree, is the element of malice and the People would have to establish malice in this case, which means that the killing was intentionally done and was without legal excuse or justification, in order to establish the offense of murder in the first degree; in addition to establishing malice, the People would have to establish

(9)

that you premeditated the crime -- in other words, that you had sufficient opportunity -- and I assume that what they would attempt to establish is that while you were coming to the Chocolate Hotel, where the offense occurred, that you had sufficient opportunity to think it over and know what you were doing at that time.

Do you understand that the People would have to prove that?

DEFENDANT ANDERSON: Yes, sir.

THE COURT: To establish murder in the first degree they would have to prove malice, that the killing was intentional and without excuse or justification in order to establish either degree of murder.

You understand that?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: And you, at this time, do you feel that you sufficiently understand the nature of the offenses in order to offer this plea of guilty at this time?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: And it is your wish at this time to offer a plea of guilty to the included offense of manslaughter, which means that the killing

(10)

was unlawfully done, but it was done without malice or premeditation?

Is that your wish at this time?

DEFENDANT ANDERSON: Yes, it is.

THE COURT: This address, on the east side of 2127 West Grand Boulevard, in the City of Detroit, that is the address of the Chocolate Bar; is that right?

DEFENDANT ANDERSON: That's right.

THE COURT: And that is in the vicinity of the Town Bar, which is across the street; is that right?

DEFENDANT ANDERSON: That's right.

THE COURT: And both of those addresses or locations are addresses or locations within the City of Detroit; is that correct?

DEFENDANT ANDERSON: That's right.

THE COURT: Very well. Will you tell the Court in your own words what you did for the purpose of determining whether the plea should be accepted -- will you tell the Court in your own words what you did so that the Court, from the beginning of the events so that the Court can determine whether the plea of guilty

(11)

to the charge of manslaughter should be accepted?

DEFENDANT ANDERSON: Well, do you want me to tell you what happened?

THE COURT: I understand you first came into this by receiving a telephone call --

MR. ROTH: By a telephone call -- start from the telephone call and then what happened --

THE COURT: I suggest you start with the phone call and tell what you did from then on?

DEFENDANT ANDERSON: I got the phone call and Barbara was telling me that --

THE COURT: Speak up a little louder, so the Reporter can hear you?

DEFENDANT ANDERSON: I got the -- I received a phone call and Barbara told me that the man was out there with a gun and he was trying to rape her; okay, then she said, "Come pick me up," and so I took my 12 guage 'cause -- because I thought, you know, I might get shot myself, and called a cab and so I caught the cab and got outside the -- got to the --

THE COURT: When you say your 12 guage -- do you mean the gun that is lying there on the table (indicating)?

(12)

DEFENDANT ANDERSON: Yes.

THE COURT: You may proceed.

DEFENDANT ANDERSON: And I got out the cab when I got there, and she come running out the gate and she said, "The man is on the side of the building," and I say, "he is," and she said, "yes," and so we walked around on the side of the building and he honked his horn, and when he honked his horn I walked over -- she said, "That's the man right there," and I walked over there to talk to him. And when I walked over to him he said -- my gun went off in the street -- and he ducked down in his car, and when he ducked down in his car I walked faster -- quickly over there to his car, pulled the door open and told him, I said, "Come on out," you know, because I didn't want to shoot him, and I told him about three times and he was steady up under the car, like he was digging for a gun or something, you know, and so I kept on telling him to come on out, you know,

because I didn't want to shoot him and I told him I wasn't going to let him hurt me, and so he didn't come up, you know, and I shot him.

THE COURT: Did you believe at the time that you went to the car in which the deceased was seated

(13)

that he was -- had attempted and was intending to rape Barbara Golden, a witness in this case?

DEFENDANT ANDERSON: Yes.

THE COURT: And had you been told that he had a gun?

DEFENDANT ANDERSON: Yes, I had.

THE COURT: And did you believe it to be so, that he had a gun?

DEFENDANT ANDERSON: Yes, sir.

THE COURT: And did you believe the information that he had attempted to rape Barbara Golden?

DEFENDANT ANDERSON: Yes, I did.

THE COURT: And that he was waiting outside at that time?

DEFENDANT ANDERSON: Yes, I did.

THE COURT: And had she told you that he was waiting outside at that time to intercept her at the time that she came out?

DEFENDANT ANDERSON: She didn't know.

THE COURT: But did she say that he was waiting outside there to stop her from coming out?

DEFENDANT ANDERSON: I don't know;

(14)

she didn't tell me that.

THE COURT: But you stated before that she called you over the phone and told you that he was waiting for her and he had a gun?

DEFENDANT ANDERSON: Yes, that's what she told me on the phone but I didn't know whether he was still out there because when I reached the hotel I didn't see anyone out there.

THE COURT: Any questions you think should be asked Mr. Mouradian?

MR. MOURADIAN: I have no questions.

THE COURT: Very well. Based on the admissions of the defendant in open court and the offered plea of guilty the Court will find the defendant, Elva Jean Anderson, guilty of manslaughter in the manner alleged in the criminal information on file in this cause and in violation of Section 750.321.

The Court will dismiss the count of murder in the first and second degrees in this case.

As I understand, the People -- you may step down, Miss Anderson.

The Court will set November 25th as the date for sentencing in this case --

(15)

MR. ROTH: November 24th would be more convenient, if the Court please?

THE COURT: Very well, sentence will be set for November 24th.

The People have not concurred in the acceptance of a plea to manslaughter in this case and dismissal of the charges of murder in the first degree and murder in the second degree.

Under some circumstances, it has been held -- in the case of the Prosecutor versus Genesee County Judge -- that a trial judge -- that a judge in a case may not accept a plea of guilty to a reduced charge in any case without the concurrence of the Prosecutor's Office. There are some exceptions to that rule.

It has been indicated to the Judges by Supreme Court judges, informally, that if there is an abuse of discretion on the part of the Prosecutor's Office that a Judge may exercise discretion in accepting a plea. This Court does not apply that rule to this case except to the following extent:

The Court would find in this case, after hearing the testimony up to this time, that the charge of murder should not have been made in this case;

(16)

that the Judge who conducted the examination in this case, if she had heard the testimony that has been given in this Court, would not have bound the defendant over on the charge of murder in the first degree and that this Court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the Court had been in possession of the facts which this Court has heard in this case.

We are dealing with a part of the law which rarely comes before the Court, and that is the right of a private citizen to enforce the law to the extent of killing another person on the claim that that person was committing a serious felony, dangerous to life or limb,

so that it was necessary to kill that person so as to prevent the commission of a felony.

This is a type of defense or exception to the law of murder or homicide that does not arise very often, but is, nevertheless, a well-recognized part of the law.

Recently, the Committee of the State Bar prepared a set of instructions in Homicide cases and,

(17)

strangely enough, there was nothing said in the instructions defining either justification, excuse, provocation, or mitigation as it applied to a charge of murder.

The People, nevertheless, in a case have the burden of proving that it was not a case of justification, or excuse -- this has been held in a number of recent cases and the People must also prove a number of other exceptions to the law -- that it was not an accident, for instance, and, in this particular case, we are dealing with the situation of a private citizen who took the law into her own hands and killed another person -- as she says -- enforcing the law.

Now, the exceptions that have been recognized to the law of homicide, including justification and excuse, are discussed in a well-written article in Volume 14 of the Encyclopaedia (sic) American, under the heading, "Homicide," and in Volume 18, under the heading, "Manslaughter," and the Court will read certain provisions that are stated therein.

Now, the first one is the exception of a public official killing a person in the enforcement of the law, either by way of execution or in making an arrest or resisting an escape, or suppressing a mob, or

(18)

other incidents of that kind.

And, in this respect, it is said, in discussing the duties and rights of private citizens, it is said, "It is,

however, laid down as law that if a felony be committed, and the felon attempts to flee from justice, it is the duty of every private citizen to use his best endeavor to prevent an escape, and if in the fresh pursuit the party be killed where he cannot be taken alive, it will be deemed a justifiable homicide. The same rule applies to cases of an attempt on the part of a felon to break away and escape after he has been arrested, and is on the way to jail."

I only read this section because it indicates instances where a private citizen is justified and required by law even to make an arrest -- even to the extent of committing a homicide.

We have another exception to the law and that is in the case where a person, in self defense, or defense of a member of the family, commits a homicide and, with regard to that, the article says:

"The ground of excuse of homicide, in case of provocation merely, is the supposed sudden passion, some influence of which the law concedes to

(19)

the frailty of human nature. But the excuse of self defense goes still further; and where a man is attacked, so that his own life is endangered, or in such way that he may reasonably suppose it to be so, he may repel the attack with mortal weapons."

Now, I have given several instances here where a citizen is justified in committing a homicide and is excused or justified in the eyes of the law. This is not -- I would not gather and I do not think the facts would justify a finding that the defendant was attempting to make an arrest of the deceased in this case and we are not concerned with that exception to the definition of murder. And this is not a situation where the defendant was justified or excused by the law in exercising self-defense and killing a person in self defense. The law says a woman is justifiable in killing one who

attempts to ravish her and if the claim had been made by Barbara Golden in this case that she had killed the deceased in self-defense that might be a possible defense and the other, a husband or a father may be justified in killing a man who attempts to commit rape on his wife or daughter, and that is not the situation

(20)

here because while the parties were living together the defendant is not the husband or father, or there is no family relationship in the case between the case between (sic) the defendant and Barbara Golden.

It has been suggested in this case that there might be a further immoral relationship that is not recognized by the law in this case but which, nevertheless, some people have recently claimed to place parties to a so-called lesbian relationship to intercede on behalf of the other to the same extent that a husband or wife would be justified. That is not the law of Michigan at this time and, therefore, the defendant cannot claim a defense of self-defense on behalf of herself or on behalf of Barbara Golden in this case.

The other article, among other things, says this:

"There are cases which the law regards as only manslaughter, without evidence of momentary excitement; partly because the law infers that from such a provocation there must be excitement; and partly, perhaps, because the party killed brought the death upon himself by his outrageous wrong. Thus, if a husband detects his wife in adultery, and instantly

(21)

and purposely takes either her life or the adulterer's, it is only manslaughter."

That is the (sic) not the situation that we have presented to us in this case, because, as I say, the law does not recognize it, but we now come to the section which directly bears on this case and which is the right

of a private citizen to enforce the law.

Now, under the laws of Michigan, a person who has supposedly committed a crime such as rape cannot be executed, summarily. That was formerly the law in England, but the Magna Carta did away with the right of putting felons to death without a trial, and so the defendant could not justify the offense merely because the deceased had, supposedly, committed a rape upon another person. It should be noted that Michigan has gone further and has absolutely abolished the death penalty for punishment for crime and, therefore, under no circumstances, could the deceased have been put to death for an alleged rape. But that does not mean that a private citizen may not enforce the law to prevent the commission of a rape or other vicious crime. In this regard the laws say:

"The law arms every private citizen in the community with the power of life and death for the

(22)

"prevention of atrocious felonies, accompanied with violence and personal danger to others; as in the case of an attempt to murder or rob, or commit burglary or arson," and I may add -- as it says in the next paragraph -- "rape," -- "the person making the attempt may, by the common law, if he cannot be otherwise prevented, be killed on the spot, and the law will not recognize the act as a crime. In cases of this sort, in order to justify the homicide, it must appear that there were good grounds for a suspicion that the person killed had a felonious intent. A woman is justifiable in killing one who attempts to ravish her and the husband or father may be justified in killing a man who attempts a rape on his wife or daughter."

The defendant in this case does not qualify under any of the other exceptions establishing justification or excuse as an exception to the crime, but she was, in this instance, entitled to rely on the facts as they appeared to her at the time of the events that

constituted the homicide. In this case the res gestae witnesses in the case gave testimony that the defendant was called by Barbara Golden and told that the deceased was attempting to rape her and that he was remaining outside

(23)

and that he had a gun.

In determining whether the defendant was justified under these circumstances the matter must be determined from the standpoint of the defendant in the case, not from the standpoint of the officers -- the officer in charge of the case, nor from the standpoint of the Prosecutor, or the Judge, but from her own honest intentions in a matter of this kind, and the Court feels that there was -- under these definitions, if the defendant had only used reasonable force in the case she would have been justified under the circumstances of this case.

The reason that this Court has accepted the plea of manslaughter in the case is the fact that the Court concludes that she did not limit herself to reasonable force in this case but that she went beyond reasonable force in the case and, therefore, committed the offense of manslaughter in this case, which is the crime as, for instance, where a policeman, in making an arrest uses excessive force and commits a homicide -- the crime is manslaughter and the same rule would apply to a citizen as in this case and, accordingly, this Court dismisses the -- Court grants Mr. Roth's

(24)

motion filed prior to the trial of this case, to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree, leaving the charge of manslaughter, to which the defendant has just pled guilty in this case.

MR. MOURADIAN: Your Honor, I would like to ask the Court one thing --

THE COURT: Mr. Mouradian, the Court has already accepted the plea.

MR. MOURADIAN: All right, but I take it that the Court is granting a mistrial in this case and -- in effect -- at the request of the defendant?

THE COURT: The Court is not granting a mistrial in the case. The Court would have felt in this case, in the interests of justice, at some stage of the proceedings that it was necessary to direct a verdict of not guilty as to the charges of murder in the first and second degrees; however, in view of the plea that was offered in the case the Court is merely granting a previous motion made by the defense to dismiss the charges and which the court feels now it should have done previously or at the time it was first heard.

MR. MOURADIAN: I would just like to

(25)

make a statement as far as the People are concerned:

No. 1, that the People have two more res gestae witnesses that the Court did not allow to testify in this case. Those witnesses -- at least one of them -- would have said that they heard the defendant say prior to killing the deceased that she was going to 'kill the mother fucker.'

That's No. 1.

No. 2, that the People's position is that there was enough on this record to sustain -- to establish that defendant went to that scene with the intention of killing the deceased; he was seated in his car. If you look at the evidence in the light most favorable to the People, Mr. Young stated that the man was asleep in his car. The doctor testified that the man was drunk to the

point of .20 alcohol in his blood system. Nobody saw him with a gun. He never had a gun. His car was searched. His person was searched. He never had a gun. There was no immediate danger to either the defendant or to Barbara Golden, or anyone else in this case, and it is the People's contention, and it was the People's theory in this case that what Miss Anderson did in this was to (1) try the deceased; find him guilty, and execute

(26)

him, and it is the People's theory and the People's belief in this case that this case was nothing but an execution of Mr. Russell. Mr. Russell had no previous police record; he was over 30 years old -- to my knowledge he had no previous police record -- and he was simply a drunken man, asleep in his car and executed by the defendant in this case. It is the People's position that the People had already made out a prima facie case of murder in the first degree.

THE COURT: The Court having heard the testimony in this case --

MR. MOURADIAN: May I have a minute, your Honor?

THE COURT: Yes -- I am going to answer part of what you said -- the Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and second degree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

MR. MOURADIAN: That's without hearing all the evidence in the case.

THE COURT: I granted the motion made

(27)

prior to the commencement of the trial in this case.

You are overlooking the fact that the law -- it is clearly established that in determining matters of this kind it must be looked at from the belief and position of the defendant, not the beliefs or position of the officers in the case or any other person, and that the Court, having heard witnesses called by the People in the case, was convinced that she was well justified in believing that there was an attempted rape in the case.

MR. THOMPSON: Your Honor, may I address the Court in this matter?

THE COURT: Yes, will you state your name for the record and position in the matter?

MR. THOMPSON: Yes, your Honor, John Thompson, Assistant Prosecuting Attorney.

Your Honor, I have just come from down stairs to this court room and I haven't heard any of the trial in this case but it is my understanding and I would appreciate the Court correcting me if I am wrong, but it is my understanding that the Court is now in the middle of a jury trial and has taken a plea to manslaughter over the Prosecution's objection?

(28)

THE COURT: Over the Prosecution's objection and despite the decision of the Supreme Court in the case of Prosecutor versus Circuit Court Judge of Genesee County. The Court believes it is not acting contrary to that.

MR. THOMPSON: I don't have it at my fingertips because of the shortness of time, but I believe there is a recent case from the Supreme Court that the Court may go ahead and take whatever pleadings it deems

proper but the Prosecution does not lose the right to retry this case, based on the original charge, and not on the manslaughter plea, as in this case, when and if we should appeal the Court's decision and the Court is reversed, based on the plea in the case.

THE COURT: I understand the purpose of all the high-priced legal talent here today is to appeal the Judge's decision in this case. I am familiar with that and it is my opinion that if the Supreme Court so orders the Court would be required to retry this case.

MR. THOMPSON: I would say that naturally that is our intention -- no matter the Court accepting the plea of what, we intend to appear in this Court and try this case on the original charge of

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first degree murder.

THE COURT: You intend to do that if I am reversed by the Court of Appeals or by the Supreme Court.

MR. THOMPSON: By the Supreme Court.

THE COURT: I may say that there is a possibility, Mr. Thompson, but I have looked at it from all possibilities that I can think of -- it is possible that it could be tried again.

MR. THOMPSON: Do we understand, your Honor, by proffering this plea, and by the Court accepting it, that the defense would waive any question of jeopardy that may arise in the substantive case?

MR. ROTH: No.

THE COURT: I think that is a question that

would properly have to be determined by the United States Supreme Court.

I have done what I think is proper in this case. In the beginn ng there was a plea offered; the Prosecutor's Office did not approve of the plea at that time, and at that time I felt that, based on the testimony taken at the examination, that the Prosecution was justified in taking the matter to trial without any

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reduced plea. I may say that, having heard the testimony in the case of the res gestae witnesses thus far, the Court is satisfied that the Court was in error in denying the motion previously. I am satisfied that if the Examining Magistrate had heard the testimony that has been heard in this Court that the defendant would not have been bound over for trial on the charge of first degree murder in this case.

MR. THOMPSON: If that's the case, your Honor, your Honor, (sic) then why did the Court not just simply dismiss the case. I don't understand exactly where the --

THE COURT: Because I have accepted the plea -- I am not prepared to do something just because the Prosecutor wants me to when I am not sure he is right.

MR. THOMPSON: Well, your Honor, I am sure --

THE COURT: Your place to determine that, Mr. Thompson, is either over on Woodward Avenue or in Lansing, but I am satisfied that what I have done is correct both factually, legally, and from a justice standpoint, and I will aide by the position I have taken.

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MR. THOMPSON: We, of course, will abide but do not necessarily agree with it.

THE COURT: You have a perfect right to appeal the case, if you can, and I assume that you will be taking those steps.

I took that into consideration in making my decision and also in making this record -- I wouldn't say that I made a record for that purpose but the record has been thoroughly preserved.

I am also inviting the Supreme Court to consider a rule where the propriety, in my opinion, or the actions are not justified -- the actions of the Prosecutor are not justified by the facts in the case; in other words, to make an exception in the case of the Prosecutor versus Genesee Circuit Court -- of course, only the Supreme Court can make that decision, although I may say that there was some discussion of it at a previous meeting of Judges at which the Supreme Court Justices were present, and I am in hopes that there will be an exception recognized in the law and -- so that I welcome an appeal in the matter.

I may say that we had a meeting of the Trial Judges with the Supreme Court Judges and the

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Trial Judges of the State of Michigan unanimously opposed the decision in the Genesee Case to no avail.

There was some discussion as to what the Supreme Court would do in the event that the facts and justice did not support the Office of the Prosecutor and I think this would be a good case to determine that.

MR. THOMPSON: Thank you, your Honor.

THE COURT: Will you agree on a sentence date.

COURT CLERK: November 24th.

THE COURT: The Court will set November 24th, as the date for sentencing and the bond previously set in the case -- the personal bond -- will be continued.

A probation report will be required.

(Hearing on the foregoing matter was concluded to sentence date.)

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